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Nagartanam a/l Balaraju v Ireka Construction Bhd (formerly known as Lai Siew Wah Sdn Bhd)

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–451 OF 2001

ZALEHA ZAHARI, KN SEGARA AND AHMAD MAAROP JJCA

25 JANUARY 2008

C

Civil Procedure — Pleadings — Set-off and counterclaim — Defendant alleging contractual right to forfeit plaintiff's deposits as liquidated damages for plaintiff's own breaches of contract — No particulars of breaches given or pleaded in set-off or counterclaim — Whether defendant entitled to forfeit such deposits

D

Contract — Deposit — Forfeiture — Procedure for exercise of right to forfeit — Pleadings alleged breaches of contract not specified or pleaded in set-off or counterclaim — Whether appropriation of security deposit unlawful and void

E

Contract — Deposit — Recovery of — Deposit paid by plaintiff as refundable security deposit for due performance of contract — No term in contract permitting appropriation of such deposit — Whether appropriation of such security deposit by defendant unlawful and void — Whether plaintiff entitled to recover deposit paid

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Hire Purchase — Ownership — Goods under hire purchase — Lessee of truck agreeing to sell truck to a third party during existence of leasing and hire purchase agreements with lessor — Whether lessee had legal ownership of truck — Whether purported sale agreement valid

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The plaintiff and the defendant entered into a contract dated 4 July 1980 ('contract') wherein the plaintiff was engaged to carry out transportation of earth for the defendant. The contract provided, inter alia: (i) that the defendant was to supply the plaintiff with a dump truck and (ii) to secure performance by the plaintiff of his obligations, the plaintiff would have to deposit an initial sum of RM6,000 and thereafter monthly sums of RM938.89 during the currency of the agreement not exceeding RM33,800. The plaintiff was also made to sign an undated letter agreeing to purchase the dump truck for RM39,800 upon expiry of the contract, on the same day the plaintiff signed the contract (4 July 1980) with the defendant. However,

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unknown to the plaintiff, the defendant had taken delivery of the dump truck from one Mortgage and Finance Bhd ('MAF') on 3 June 1980 pursuant to a lease agreement between MAF and the defendant. Under the lease agreement, the defendant was to pay MAF RM905 per month for 24 months, commencing 3 June 1980. At the end of the lease agreement, the defendant entered into a one-year hire purchase agreement with MAF in which it was stated that the dump truck would remain the absolute property of MAF until all payments had been made. The contract between the plaintiff and the defendant subsequently came to an end by reason of effluxion of time on 6 June 1983. The plaintiff then sought the return of the security deposits paid pursuant to the provisions of the contract, amounting to a sum of RM28,540.05. The defendant, whilst admitting that it had received the sum of RM28,540.05 as deposit pursuant to the contract, nevertheless claimed, inter alia: (a) it was entitled to forfeit all deposits as agreed liquidated damages; (b) the plaintiff had agreed to purchase the dump truck for RM39,800 upon the expiry of the contract and had authorised the defendant to set off all payments of deposits towards payment of the purchase price. The plaintiff however averred that the deposit was for the due performance of the contract for the transportation of earth which was refundable at the end of the contract and not for the purchase of the dump truck. The plaintiff's claim for the return of his deposits was dismissed in the High Court and hence this appeal.

Held, allowing the appeal with costs here and below:

(1) In order to exercise or assert its contractual right to forfeit any money, in answer to the plaintiff's claim for the return of his security deposit, the defendant had to plead, by way of a set-off and counterclaim, the alleged breach or breaches of the contract that entitled the defendant to forfeit the said sum by way of liquidated damages under the contract and prove the same. The defendant had glaringly failed to do this or to sue the plaintiff on the alleged agreement contained in the undated letter concerning the purchase of the dump truck (see para 23).

(2) It was irrefutable from the documentary evidence on record, that the property in the dump truck, during the currency of the plaintiff's three year contract with the defendant or, even upon its expiry on 5 June 1983, was not in the hands of the defendant. Instead the dump truck remained the absolute property of MAF until 5 July 1983. Under such circumstances, the defendant could not have sold or agreed to sell the dump truck to the plaintiff nor could the plaintiff have agreed to buy the dump truck on the date the contract was signed on 4 July 1980 (see para 26).

(3) All the official receipts issued by the defendant in respect of the plaintiff's payments for security deposit under the contract reflected that the defendant had deemed the said payments to be in fact made for the hiring of the dump truck. Appropriation of the security deposit for the hiring of the dump truck was not a term of the contract. Thus, any appropriation by the defendant was unlawful and void. There was no lawful and valid agreement between the plaintiff and the defendant permitting such appropriation. The defendant was not entitled, upon the expiration of the contract to retain the payments which were made by way of security deposit for due performance of the contract (see para 27).

[Bahasa Malaysia summary

Plaintif dan defendan telah memasuki kontrak bertarikh 4 Julai 1980 ('kontrak') di mana plaintif telah dilantik untuk melaksanakan kerja-kerja mengangkut tanah untuk defendan. Kontrak itu memperuntukkan, antara lain: (i) bahawa defendan perlu membekalkan plaintif dengan sebuah lori pengangkut dan (ii) untuk menjamin pelaksanaan tanggungjawabnya, plaintif perlu mendepositkan jumlah pendahuluan sebanyak RM6,000 dan diikuti dengan jumlah bulanan sebanyak RM938.89 semasa perjanjian berkuat kuasa tidak melebihi RM33,800. Plaintif juga dipaksa menandatangani surat yang tidak bertarikh untuk bersetuju membeli lori pengangkut berjumlah RM39,800 selepas tamat kontrak, pada hari yang sama plaintif menandatangani kontrak tersebut (4 Julai 1980) dengan defendan. Walau bagaimanapun, tanpa pengetahuan plaintif, defendan telah mengambil milikan lori pengangkut itu daripada Mortgage and Finance Bhd ('MAF') pada 3 Jun 1980 menurut perjanjian pajakan antara MAF dan defendan. Di bawah perjanjian pajakan itu, defendan hendaklah membayar MAF RM905 sebulan selama 24 bulan, bermula 3 Jun 1980. Di akhir perjanjian pajakan, defendan telah memasuki perjanjian sewa beli selama setahun dengan MAF di mana dinyatakan bahawa lori pengangkut kekal milik mutlak MAF sehingga kesemua bayaran dibuat. Kontrak antara plaintif dan defendan kemudiannya berakhir disebabkan luput had masa pada 6 Jun 1983. Plaintif kemudian memohon untuk pengembalian wang jaminan yang telah dibayar menurut peruntukan-peruntukan kontrak, berjumlah RM28,540.05. Defendan, yang mengakui bahawa ia telah menerima jumlah RM28,540.05 sebagai deposit menurut kontrak itu, walau bagaimanapun telah menuntut, antara lain: (a) ia berhak merampas kesemua deposit sebagai ganti rugi jumlah tertentu yang dipersetujui; (b) plaintif bersetuju untuk membeli lori pengangkut itu pada harga RM39,800 setelah tamat tempoh kontrak itu dan telah memberi kuasa kepada defendan untuk menolak kesemua bayaran deposit terhadap bayaran untuk harga belian. Plaintif bagaimanapun menegaskan bahawa deposit itu adalah untuk pelaksanaan

kontrak tersebut untuk pemindahan tanah yang akan dipulangkan setelah kontrak disempurnakan dan bukan untuk pembelian lori pengangkut itu. Tuntutan plaintif untuk pulangan depositnya telah ditolak di Mahkamah Tinggi dan maka rayuan ini.

Diputuskan, membenarkan rayuan dengan kos di mahkamah ini dan di Mahkamah Tinggi:

(1) Bagi tujuan melaksanakan atau menegaskan hak kontraknya untuk merampas apa-apa wang, sebagai menjawab tuntutan plaintif untuk memulangkan deposit jaminannya, defendan sepatutnya memplid, melalui satu penolakan dan tuntutan balas, pelanggaran yang dikatakan atau pelanggaran-pelanggaran kontrak yang memberi hak kepada defendan untuk merampas jumlah tersebut melalui ganti rugi jumlah tertentu di bawah kontrak itu dan membuktikannya. Defendan dengan jelas telah gagal berbuat demikian atau untuk menyaman plaintif atas perjanjian yang dikatakan terkandung dalam surat yang tidak bertarikh berkaitan pembelian lori pengangkut tersebut (lihat perenggan 23).

(2) Ia tidak dapat disangkal daripada keterangan dokumentar atas rekod, bahawa pemilikan lori pengangkut, semasa kontrak tiga tahun plaintif dengan defendan berkuat kuasa, mahupun selepas ia luput pada 5 Jun 1983, bukan pada defendan. Sebaliknya lori pengangkut itu kekal milik mutlak MAF sehingga 5 Julai 1983. Di bawah keadaan sedemikian, defendan tidak mungkin telah menjual atau bersetuju untuk menjual lori pengangkut itu kepada plaintif dan plaintif tidak mungkin telah bersetuju untuk membeli lori pengangkut itu pada tarikh kontrak ditandatangani pada 4 Julai 1980 (lihat perenggan 26).

(3) Kesemua resit-resit rasmi yang dikeluarkan oleh defendan berkaitan bayaran plaintif untuk deposit jaminan di bawah kontrak itu menggambarkan bahawa defendan telah menganggap bayaran tersebut sememangnya telah dibuat untuk menyewa lori pengangkut itu. Pengambilan deposit jaminan itu untuk menyewa lori pengangkut itu bukan suatu terma kontrak itu, Oleh itu, apa-apa pengambilan oleh defendan adalah menyalahi undang-undang dan tidak sah. Tiada perjanjian yang sah antara plaintif dan defendan yang membenarkan pengambilan sedemikian. Defendan tidak berhak, setelah tamat tempoh kontrak itu menahan bayaran-bayaran yang dibuat melalui deposit jaminan untuk pelaksanaan kontrak tersebut (lihat perenggan 27).]

Notes

For a cases on recovery of deposit, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 3452.

A For a case on set-off and counterclaim, see 2(3) *Mallal's Digest* (4th Ed, 2008 Reissue) para 5514.

For cases on forfeiture of deposit, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3437–3449.

B For cases on goods under hire purchase, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3920–3923.

Appeal from: Civil Suit No C3316 of 1983 (High Court, Kuala Lumpur)

C

Harpal Singh Grewal (Jasvinjit Singh with him) (AJ Ariffin Yeo & Harpal) for the appellant.

Ivan Loo (Ganesh KS Sinnadurai with him) (Skrine) for the respondent.

D **KN Segara JCA (delivering judgment of the court):**

[1] The plaintiff ('appellant'), Nagartanam a/l Balaraju and the defendant ('respondent'), Ireka Construction Bhd (formerly known as Lai Siew Wah Sdn Bhd), had entered into an agreement dated 4 July 1980 wherein Lai Siew Wah Sdn Bhd was described as the contractor and Nagartanam a/l Balaraju was described as the sub-contractor. The defendant agreed to employ the plaintiff to carry out transportation of earth subject to the terms and conditions set out in the said agreement. The plaintiff brought an action in the High Court against the defendant at the expiration of the said agreement, primarily for the return of the security deposit paid pursuant to the provisions of the agreement. The plaintiff's action was dismissed in the High Court and, hence this appeal by the plaintiff.

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G **[2]** In order to understand the plaintiff's case against the defendant, it is crucial to focus on the terms and conditions of the written agreement between the plaintiff and the defendant dated 4 July 1980 for transportation of earth (at p 257 of the record of appeal) ('the contract'). Although dated and signed on 4 July 1980, the contract stipulated that it was to commence on *7 June 1980* and expire on 6 June 1983 (a period of three years), unless extended by the defendant in writing, as provided under cl 1. The contract was not extended and, therefore, *expired by effluxion of time on 6 June 1983*. The plaintiff filed his writ on 12 December 1983.

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I **[3]** Clause (2) of the contract reads:

The Sub-Contractor:

(a) *shall use an Isuzu TD50 dump truck* bearing Registration No WW 885

Chassis No 1814536 Engine No 475064 supplied by the Contractor for the purpose of *carrying out the transportation of earth for the Contractor.*

(b) at his own expense, supply labour, diesel, lubricant oils for the said Isuzu TD50 dump truck and all other working tools and materials necessary for the execution of the sub-contract work.

(c) *reimburse* the Contractor or *pay for the premium* in respect of *adequate insurance* coverage of the said Isuzu TD50 dump truck and shall insure his employees under workmen's Compensation or SOCSO Scheme.

(d) ...

(e) ...

(Emphasis added.)

[4] The contract did not mention that the defendant had taken delivery of the dump truck, identified in para (a) of cl (2), from Mortgage and Finance Bhd ('MAF') on 3 June 1980 pursuant to a lease agreement dated 3 June 1980 between MAF and M/s Lai Siew Wah Sdn Bhd ie, the defendant. The plaintiff was never informed by the defendant, orally or in writing that the dump truck was on lease to the defendant from MAF. Under the said lease agreement, the defendant was required to pay MAF a rental of RM905 per month for the lease period of 24 months, commencing on 3 June 1980. Under cl 8(a) of the lease agreement the defendant shall insure the said dump truck for its full insurable value. The insurable value for the purposes of cl 8(a) was stipulated in the lease agreement as RM23,000 for the first year and RM16,000 for the second year (see lease agreement at pp 24–27 in the *rekod rayuan tambahan*).

[5] Clause 2 of the contract did not stipulate that the plaintiff was required to reimburse or pay the rental (of RM905) for the dump truck to be incurred by the defendant, although the defendant was obliged to pay monthly to MAF the said rental, commencing from 17 June 1980, for the whole period of the lease.

[6] It was never a term of the contract that during the currency of the said contract the plaintiff was to pay to the defendant any sum for hiring the dump truck. Nevertheless, the sum of RM6,000 paid by the plaintiff, as security deposit pursuant to cl 8(a) of the contract, has been unilaterally treated by the defendant as plaintiff's payment of deposit for hiring of the said dump truck. This is irrefutable from the documentary evidence, namely, the official receipt No 1895, dated 7 June 1980 (that is, the date of the commencement of the contract), at p 200 of the *rekod rayuan*. It reads:

A Received from Nagartanam a/l Balaraju Dollars Six Thousand Only in payment of Deposit for Hiring one unit of Isuzu TD50 dump truck S/No 1814536 & Eng No 475064.

For LAI SIEW WAH SDN BHD

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[7] Indeed, all the official receipts issued by the defendant to the plaintiff are 'in payment of deposit for hiring of Isuzu dump truck'.

There is not a single official receipt to acknowledge that the defendant has received any security deposit from the plaintiff under cl 8(a) and (b) of the contract (see C *official receipts issued by the defendant from pp 200–215 of the rekod rayuan*). The learned trial judge completely failed to evaluate this evidence. In failing to do so, he has misdirected himself in law and in fact with reference to the plaintiff's claim for a refund of his security deposit and, thereby erred in concluding that the plaintiff had not proved his pleaded case. If the defendant D has not accepted any payments made by the plaintiff as security deposit, it follows, as a logical conclusion, there would be no money in the hands of the defendant to forfeit from the plaintiff under cl 8(c). Under such circumstances, any forfeiture of plaintiff's money by the defendant, for any breach of the terms of the contract, would be untenable and unlawful.

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[8] Clause 8 of the agreement reads:

(a) To secure the performance by the Sub-Contractor of his obligations and covenants hereunder, the Sub-Contractor shall deposit the sum F of dollars $6,000.00 with the Contractor.

(b) To further ensure that the Sub-Contractor will not abandon the contract before its due date (the abandonment or failure to perform by the Sub-Contractor is acknowledged by the parties hereto as highly G damaging to the Contractor's business) the Sub-Contractor shall on or before the day of every month during the currency of this agreement deposit the further sum of $938.89 with the Contractor but so that the aggregate of such additional monthly deposit shall not exceed $33,800.

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(c) In the event of breach by the Sub-Contractor of the terms of the contract, or the failure by the Sub-Contractor to complete the said term of three years, the Contractor shall be entitled to forfeit all the deposits so made under subpara (a) plus (b) hereof as agreed liquidated damages. I

[9] An undated typewritten letter, addressed to the defendant, *agreeing to purchase the dump truck for the sum of RM39,800 upon expiry of the contract*, was obviously 'pre-prepared' by the defendant before the contract was

executed. Thereafter, the plaintiff was undoubtedly prevailed upon by the defendant to sign the said letter *on the same day the plaintiff signed the contract (4 July 1980)*. A careful reading of the said letter, particularly the last paragraph thereof, clearly demonstrates the defendant's intent and attempt to ingeniously and unconscionably create a situation of 'heads, I win; tails, you lose'; in relation to the security deposits under cl 8(a) and (b) of the contract.

[10] The dump truck, in all probability, will only have scrap value, at the expiry of the contract. The dump truck will most certainly suffer severe wear and tear in the off-road use of it by the plaintiff, in the execution of the contract under cl 2(a) and 6. No person in his right mind would agree to purchase the said dump truck, upon the expiry of the contract, at the same value as at the commencement of the contract. The said undated letter (p 278 of the record of appeal) reads:

> To
>
> Lai Siew Wah Sdn. Bhd.
>
> Taman Midah, Jalan Cheras
>
> Kuala Lumpur
>
> I/We Nagartanam A/L Balaraju I/C No. 5987090 the Sub-Contractor, hereby agree to purchase the TD50 dump truck with Registration No. WW 885 Chasis No. 1814536 Engine No. 475064 from your company for the sum of dollars $39800.00 upon expiry of my/our contract with your company dated 4th July, 1980.
>
> I hereby authorize your company to contra all the deposits retained by your company towards payment of the purchase price.
>
> Dated this ... day of ...
>
> .....
>
> (Nagartanam a/l Balaraju)

[11] A careful scrutiny of the documentary evidence (that is, the lease agreement, dated 3 June 1980 (p 24 *rekod rayuan tambahan*) and the hire purchase agreement, dated 1 July 1982 (p 39 of the *rekod rayuan tambahan*) relating to the said dump truck would reveal that the purported agreement to purchase by the plaintiff stated in the undated letter is null and void, because the defendant was in no position to agree to sell the dump truck on the date the plaintiff was made to sign the said undated letter. In any event, the plaintiff denied he ever agreed to buy the dump truck from the defendant. The purchase price of RM39,800 for the dump truck, at the expiry of the contract, is too ludicrously high, for anyone to agree.

[12] DW2, a director of the defendant, testified that the financing for the purchase of the dump truck was obtained from MAF. Under the lease agreement, dated 3 June 1980, the defendant has to pay 24 rentals of RM905 monthly, with effect from 17 June 1980 and, at the end of the lease contract the defendant may offer to purchase the dump truck from MAF (see pp 23–27 of the *rekod rayuan tambahan*). Clause 3 of the lease agreement clearly provides that the *defendant* (lessee) shall have *no right of property* over the dump truck and is merely a *bailee* to use the same subject to the terms and conditions in the lease agreement:

> 3 The Lessee acknowledges that the Goods are and throughout the period of this Lease shall remain the sole property of the Lessor and the Lessee shall have no right of property therein but is merely a bailee to use the same subject to the terms and conditions herein contained.

At the end of the 24 months of the lease agreement, *the defendant entered into a one year hire purchase agreement, dated 1 July 1982, with MA*F for the purchase of the dump truck at the hire purchase price of RM6495 and cash price of RM6,000 (see the Schedule in the hire purchase agreement at p 40 of the *rekod rayuan tambahan*). Under the repayment schedule, the balance of hire is payable by 11 monthly installments of RM417.80 and one final rental of RM408, commencing on 25 July 1982 and, thereafter, on or before the 25th day of each succeeding month until the said 12 rentals have been paid in full. *Under cl 4 of the hire purchase agreement* the hirer (defendant) shall not have any right or interest in the dump truck other than that of hirer under the agreement until all the 12 payments have been made and, the dump truck *shall remain the absolute property of the owner* (that is, MAF). *The hirer shall not represent or hold himself out to be the owner of the dump truck*:

> 4 If the Hirer pays all sums due or payable under this agreement including the initial payment made upon signing of this agreement for the option to purchase and the monthly payments by way of rent for the hiring and has strictly performed and observed all the conditions of this agreement the hiring shall come to an end and the said goods shall become the property of the Hirer and the Owner will assign and make over all its right and interest in the same to the Hirer *but until all such payment as aforesaid have been made* and the said conditions have been performed *the said goods shall remain the absolute property of the Owner*, and the Hirer shall not have any right or interest in the same other than that of Hirer under this agreement. In particular and without prejudice to the foregoing, *the Hirer shall not represent or hold himself out* as or do or suffer anything *whereby the Hirer may be reputed to be Owner* of the goods *and any implied consent of the Owner is also hereby expressly excluded*.
>
> (Emphasis added.)

[13] In the above circumstances, even upon the expiry of the contract on 6 June 1983, the defendant had no right, pursuant to cl 4 of the said hire purchase agreement, to hold himself out as the owner of the dump truck and attempt to sell the same to the plaintiff because, it was only on *5 July 1983* that MAF withdrew its ownership claim on the dump truck, when it wrote a letter to the RIMV (see letter at p 43 of the *rekod rayuan tambahan*).

[14] The defendant did not plead any set-off and counterclaim against the plaintiff for damages arising from any breach of the terms and conditions in the contract.

[15] The plaintiff's evidence is simple and consistent with the contract. His understanding was that the deposit was for the due performance of the contract for the transportation of earth and refundable at the end of the contract. *At no time did he agree that the defendant could use the deposit towards the purchase of the dump truck*. He maintained that the contract was not for the purchase of the dump truck (lorry):

> Pada masa itu, saya tidak mampu membeli lori itu, tetapi mampu mendapatkan kontrak sahaja. Kontrak ini tidak untuk membeli lori.

[16] The plaintiff (PW1) testified, inter alia:

(Examination-in-chief)

> Pada 1980, saya telah menandatangani satu perjanjian dengan defendan BD2 Pg 1–3 referred to witness ... Di bawah perjanjian ini saya diminta mengangkat tanah dari satu tempat ke satu tempat lain. *Saya telah membayar sebanyak RM6,000 kepada defendan, sebagai deposit*.
>
> Jumlah deposit adalah RM38,000. Selain dari RM6,000 bakinya RM32,800.00 adalah akan dibayar sebanyak RM938.89, yang akan dipotong daripada pendapatan bulanan saya. Selepas itu saya meneruskan kerja ini.
>
> BD1 Pg dirujuk kepada saksi. *Ini adalah penyata akhir yang saya terima daripada defendan*.
>
> (Emphasis added.)

[17] Now, the 'penyata akhir' alluded to by the plaintiff, is the statement of account, dated 5 May 1983 found at p 232 of the record of appeal, issued by the defendant. It shows a credit balance of RM28,533.36.

[18] In his evidence the plaintiff also said:

Defendan membekalkan saya lori untuk mengangkut tanah. Saya tidak membayar untuk menggunakan lori yang dibekalkan kepada saya. Di bawah perjanjian tersebut, saya hanya perlu membayar sebanyak $938.89 untuk meneruskan kerja tersebut. Untuk kegunaan lori tersebut, saya tidak perlu membayar apa-apa.

Apabila saya tandatangan surat di muka surat 5, saya diberitahu saya boleh membeli lori itu selepas tiga tahun ataupun deposit tersebut akan dipulangkan kepada saya. Saya teruskan kontrak ini dan kemudian selepas dua tahun saya telah berhenti kerja tersebut. Saya pulangkan lori itu kepada defendan pada Disember 1983. Saya berhenti kerja ini kerana saya tidak dapat keuntungan dan lori itu sentiasa rosak. Pada masa saya menggunakan lori itu, perbelanjaan untuk spare part dan maintenance akan dipotong daripada pendapatan saya. Saya membayar untuk memperbaiki lori itu.

Selepas saya berhenti perjanjian tersebut, saya diminta untuk membeli lori tersebut, tetapi saya tidak ingin membeli lori tersebut, kerana saya tidak mendapat keuntungan. Malah pula, lori itu sentiasa rosak.

Saya telah meminta RM6,000 dan deposit bulanan untuk dikembalikan kepada saya. Defendan enggan membayar. Defendan telah memaksa saya membeli lori tersebut, tetapi tidak menunjukkan surat di muka surat 5 BD2.

... Saya tidak membenarkan defendan menggunakan deposit yang saya telah bayar, sebagai harga pembelian lori itu.

Saya meminta pengembalian deposit itu dan deklarasi bahawa surat tersebut adalah tak sah dan batal.

(Cross-examination)

...

S: Awak bayar tiap-tiap bulan untuk kerja. Anda bayar untuk kerja anda, betul?

J: Ya, untuk kontrak.

S: Orang lain dibayar untuk kerja. Anda bayar untuk kerja anda, betul?

J: *Pembayaran saya adalah untuk deposit kontrak untuk mengangkut.*

S: Tiap-tiap bulan Lai Siew Wah ada beri resit?

J: Ya, betul.

S: BD1 muka surat 49 dirujuk kepada saksi. Ini adalah satu resit?

J: Ya, betul.

S: Resit ini adalah untuk penyewaan lori?

J: *Saya tidak tahu apa yang tertulis dalam resit tetapi saya tahu ini adalah untuk bayaran bulanan.*

(Re-examination)

Q. When you signed this contract BD2 p 1, and letter p 5, were you told that the agreement and the letter were one contract?

A: Ya.

Q: Were you positive that p5 was not dated?

A: Ya.

[19] The statement of defence is at pp 61–64 of the appeal record. It is significant to note that the defendant has not pleaded any set-off and counterclaim, in answer to the plaintiff's claim for a return of the monies deposited by him under the contract. While admitting the execution of the contract, the defendant contends that the payments by the plaintiff were a deposit to ensure the plaintiff will complete the contract and in the event there was a breach by the plaintiff, the defendant was entitled to forfeit all deposits as liquidated damages. In the event the contract was carried out to its completion, the plaintiff was entitled to purchase the dump truck from the defendant for the sum of RM39,800. As regards the undated letter, prepared alongside the contract, signed by the plaintiff and addressed to the defendant, the defendant contends that the plaintiff agreed to purchase the dump truck for the sum of RM39,800 upon the expiry of the agreement and authorised the defendant to set off all payments of deposits towards payment of the purchase price.

[20] The defendant admits that a sum of RM28,540.05 was paid as deposit pursuant to the contract and claimed that it exercised a contractual right in forfeiting the said deposit as agreed liquidated damages.

[21] It is trite law, practice and procedure, that in order to exercise or assert defendant's contractual right to forfeit any money, in answer to plaintiff's claim for the return of the security deposit, *the defendant must plead*, by way of a set-off and counterclaim, the alleged breach or breaches of the contract that entitles the defendant to forfeit the said sum by way of liquidated damages under the contract and prove the same. The defendant has glaringly failed to do this or to sue the plaintiff on the alleged agreement contained in the undated letter vide the dump truck.

[22] DW1, a director of the company, testifying on behalf of the defendant, said that he never told or promised the plaintiff that whatever sums of monies he had paid will be refunded to him.

[23] DW1 testified, inter alia:

(Examination-in chief)

I have never told or promised the plaintiff that whatever sums of money he has paid would be refunded to him.

The agreement upon successful performance will entitle the plaintiff to the truck and all payments made by him is subject to a contra. He must fulfill his obligations under the agreement.

Plaintiff is not the only subcontractor who signed this agreement. We have a total of 54 agreements of this nature. The plaintiff is one of them.

(Cross-examination)

Pg 11–13 of D1 — The purpose of collecting RM6,000 and then deducting RM938.89 is to assist the company perform the contract obligations. The collections are by way of security deposit to perform the subcontract works.

On a reading of this agreement pp 11–13, it (the deposit) cannot be applied for any other purpose than stated in the agreement.

We are actually assisting the subcontractor not only earn a living but also to own a truck eventually. If the sub-contractor completes the contract, he has the commitment to purchase the truck.

Pg 14 is never dated and will be dated if the subcontract is fully performed. Completion of the contract means the subcontractor will purchase the lorry. However, the project has been abandoned. This letter was not included in the agreement. It is part of the subcontractor's commitment to own this truck. *He has no option to seek a refund of the deposit.*

The true intention of the defendant is to apply the money towards the purchase price of the truck. The objective of the agreement is to assist the subcontractor to own a truck upon completion.

The subcontractor's option is to own the truck. The objectives are not mentioned but there are clauses related to the objective.

I propose a sum of RM33,800 as security deposit. This is the cost of the truck. When the contract commenced on 4 July 1980, the truck was valued at RM33,800. I can't recall how much loan was taken on the truck. At the end of the contract period, the book value, I can check from the book.

D2 is my calculation. T*he residual value as at 10 July 1982 was RM6000.*

As at 25 June 1983, the residual value was nil. When I requested the deposit of RM33,800, it reflected the value of the vehicle at the time of the agreement ie 4 July 1980. *I agreed to sell the vehicle to the plaintiff on the day of the subcontract was signed.* That was the date of the commitment on the date of the agreement. *I sold the vehicle to the plaintiff on the date of the subcontract. The transfer was to be effected upon the completion of the subcontract.*

The monthly deductions become a fund to the defendant's company. The company paid for the truck at the time of the purchase. We financed the scheme.

[24] It is irrefutable from the documentary evidence namely, the lease agreement and the hire purchase agreement, that the property in the dump truck, during the currency of the plaintiff's three year contract with the

defendant or, even upon its expiry on 5 June 1983, was not in the hands of the defendant. Instead the dump truck remained the absolute property of MAF until 5 July 1983. Under such circumstances, the defendant could not have sold or agreed to sell the dump truck to the plaintiff nor could the plaintiff have agreed to buy the dump truck on the date the contract was signed on 4 July 1980.

[25] All the official receipts issued by the defendant in respect of the plaintiff's payments for security deposit under the contract reflect that the defendant has deemed the said payments to be in fact made for the hiring of the dump truck. Appropriation of the security deposit for the hiring of the dump truck is not a term of the contract and, therefore, any appropriation by the defendant is unlawful and void. There is no lawful and valid agreement between the plaintiff and the defendant permitting such appropriation. The defendant is not entitled, upon the expiration of the contract to retain the payments which were made by way of security deposit for due performance of the contract.

[26] The appeal is unanimously allowed. The decision of the High Court judge is set aside. The undated document referred to in para 4 of the statement of claim is hereby declared null and void. Judgment entered for the plaintiff in the sum of RM28,540.05 (admitted to have been received by the defendant from the plaintiff, in the statement of defence), with interest at 4% per annum from the date of filing of the action till date of judgment and, thereafter, at 8% per annum till date of full payment.

[27] Costs to the plaintiff, here and below. Deposit of this appeal to be refunded to the plaintiff (appellant).

[28] YA Datin Paduka Zaleha Zahari JCA and YA Dato' Ahmad Maarop JCA have seen this judgment in draft and are in agreement with the contents thereof.

[29] Order accordingly.

Appeal allowed with costs.

Reported by Andrew Christopher Simon